RECORD AND BRIEF

Nos. 16-1436 and 16-1540

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAI'I, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF NEW YORK UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae New York University ("NYU" or the "University") is an institution of higher learning headquartered in New York City, with campuses on nearly every continent. A critical component of NYU's global mission is to create an environment that fosters achievement borne of the free exchange of ideas and information. By welcoming and engaging students and scholars from the broadest range of backgrounds and nationalities, NYU is able to advance that mission.

As a global university centered in New York City—one of the world's most internationally diverse cities—NYU has a vital interest in the proper administration, within constitutional limits, of the immigration laws of the United States. NYU is deeply concerned that the Executive Order issued by the President on March 6, 2017, titled "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Executive Order"), like its immediate predecessor, exceeds those limits. If allowed to stand, it would impair unique educational opportunities that NYU is otherwise able to provide, and thus inflict harm on the University, on its constituents and on the community at large. This Court implicitly recognized in its June 26, 2017 decision granting certiorari the importance of relationships between entities like NYU and foreign nationals whom the Executive Order would seek to bar. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) ("An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded.").[1]

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1. The parties consent to the filing of this brief, which authorizes NYU to file it pursuant to Sup. Ct. R. 37. Petitioners have

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Thousands of prospective students apply to NYU every year, seeking the opportunity to study at one of the most internationally diverse universities in the world. At the core of NYU's institutional mission are the twin aims of providing an exceptional academic experience for its students and fostering world-class international scholarship. NYU has invested significant resources in developing an environment in which its diverse student body and faculty can thrive, for the benefit of the academic community, the United States, and the world. Implementation of the Executive Order would significantly undermine these efforts.

By obstructing the entry of international students, faculty and other scholars into the United States based solely on their having come from one of the Muslim-majority countries singled out for adverse treatment in the Executive Order—without any reason to believe that these individuals are involved in any terrorist activity—the Order would gratuitously and unlawfully encumber NYU's ability to conduct its many international programs, which rely on input from faculty and students from the affected countries; impair NYU's ability to transmit its strongly-held values abroad; and obstruct its ability to provide to all of its students the educational benefits that

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filed a blanket letter of consent. Respondents' consent is being filed herewith. No counsel for a party authored this brief in whole or in part, and no party, or counsel for a party, contributed money intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its constituents or its counsel contributed money intended to fund the preparation or submission of the brief.

flow from a fully diverse student body and faculty. For these reasons, among others, this Court should find that the Executive Order exceeds the President's statutory authority under the INA and violates the Constitution, and affirm the decisions of the courts below.

ARGUMENT

I. A Diverse International Community is Critical to NYU's Identity and Mission.

NYU is a "Global Network University," with campuses around the world, including in Africa, Asia, Europe, North America, and South America.[2] These campuses offer all NYU students a range of multi-disciplinary opportunities for research, teaching and scholarly collaboration. In addition to developing its own campuses, NYU has partnered with numerous schools worldwide both to create educational opportunities for international students and scholars,[3] and to expose its domestic students to the vast

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2. *See* NYU, *The Global Network*, *available at* https://www.nyu.edu/faculty/governance-policies-and-procedures/faculty-handbook/the-university/organization-and-administration/the-global-network.html.

3. *See Global Academic Partnerships and affiliations*, NYU (March 2, 2016), *available at* https://www.nyu.edu/faculty/global-academic-partnerships-and-affiliations.html (describing global partnerships and affiliations with schools for the humanities, business, medicine, sociology, anthropology, and the arts, located in Accra, Berlin, Buenos Aires, Florence, London, Madrid, Paris, Prague, Sydney, Tel Aviv, and Washington D.C.); *see also Update on Faculty Engagement and Academic Development at the Global Sites (6/11/15 Memo)*, NYU (June 11, 2015), *available at* https://www.nyu.edu/faculty/global-academic-partnerships-and-affiliations/memos/

wealth of experience and knowledge that can be gained by traveling, researching and studying abroad.[4]

Attracting to the United States international students and scholars from a wide variety of backgrounds is intrinsic to NYU's success as an educational institution. To that end, NYU has made it a priority to "embrace diversity among faculty, staff and students to ensure a wide range of perspectives, including international perspectives, in the educational experience."[5] Its efforts have been highly successful—in 2015-2016, NYU hosted more international students and scholars than any other university in the United States—approximately 15,000 international students and more than 1,200 international scholars,[6] constituting more than a third of NYU's graduate student population, and nearly a fifth of its undergraduate population. The most creative, talented, and industrious members of communities all over the world have at one time called NYU home.[7]

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faculty-engagement-june-2015.html (detailing the growth of new collaborative programs with faculty, students and departments at partnership and affiliate schools).

4. *See, e.g.*, NYU International Exchange Program, NYU, https://www.nyu.edu /academics/studying-abroad/exchange/internationalexchange.html; Stern IBEX (International Business Exchange), NYU, https://www.nyu.edu/academics/studying-abroad/exchange/stern-ibex-international-business-exchange.html.

5. NYU Mission Statement, *available at* www.nyu.edu/about.

6. NYU Office of Global Services, *Annual Report: September 1, 2015 - August 31, 2016, available at* http://www.nyu.edu/content/dam/nyu/globalServices/documents/annualreport/annual%20report.pdf.

7. Many NYU alumni from foreign countries have gone on to become leaders in their communities. To take but a few examples,

NYU's presence in New York City has itself played an integral role in the University's ability to achieve its international mission, proudly "tak[ing] its name and spirit from one of the busiest, most diverse and dynamic cities of all."[8] Millions of immigrants have come to New York as the first step toward making a life in the United States,[9] believing that the Statue of Liberty in fact welcomes the "huddled masses yearning to breathe free . . . ."[10] New York is home to millions of foreign-born residents—more than a third of the City's population.[11] The City has long served as a hub of international commerce, cultural exchange

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NYU alumni Shimon Peres, the ninth President of Israel, and former Egyptian vice president Mohammed Mustafa ElBaradei, both won the Nobel Peace Prize for their contributions to the region targeted by the Executive Order. Working with fellow NYU School of Medicine alumnus Jonas Salk, Albert Sabin developed oral polio vaccines that played a key role in substantially eradicating the disease. More recently, Eric Richard Kandel, who also attended NYU's School of Medicine, was awarded a Nobel Prize in Physiology or Medicine for discoveries that paved the way to the modern understanding of memory formation.

8. NYU Mission Statement, *available at* www.nyu.edu/about.

9. From 1892 to 1954 alone, over twelve million immigrants came to the United States through Ellis Island. *See* Ellis Island History, www.libertyellisfoundation.org/ellis-island-history.

10. Emma Lazarus, "The New Colossus," Liberty State Park (1883) *available at* http://www.libertystatepark.com/emma.htm (last accessed September 5, 2017).

11. Thomas P. DiNapoli, "The Role of Immigrants in the New York City Economy," New York State Comptroller Report 7-2016 (Nov. 2015), *available at* https://osc.state.ny.us/osdc/rpt7-2016.pdf ("Nearly three-quarters of the 4.4 million immigrants in New York State live in New York City . . . .").

and diplomacy. Its international influences are woven into the fabric of everyday life experienced by NYU's students and scholars,[12] and its spirit infuses and amplifies NYU's culture of embracing diversity.

NYU's mission and values are embodied in the words of its current president, Dr. Andrew Hamilton, himself an immigrant. In a letter to the NYU community addressing the January 27, 2017 Executive Order that preceded the Executive Order now at issue in these proceedings, Dr. Hamilton articulated the importance of free movement across borders in pursuit of scholarship and the harm arising from its unwarranted obstruction:

> As a scientist who studied and worked in four countries before becoming a citizen of the U.S., I know how important it is to be able to move across borders in peaceful pursuit of one's scholarship. I know, too, more than most given my background and my field, how much goodwill the U.S. earns for itself through the openness of its education system and how widely those who study here can spread American values.

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12. *Students Share International Experiences at Global Engagement Symposium*, NYU Arts & Liberal Studies (March 20, 2015), *available at* http://liberalstudies.nyu.edu/content/nyu-as/liberalstudies/news_and_events/students-share-international-experiences-at-global-engagement-sy.html ("[Students] presented on experiences that included installing a solar electricity system in a Nicaraguan village, independent research into NYU London's history as the headquarters of a musicians' club, and writing a policy report on asylum seekers in Tel Aviv.") (One student commented: "One of the main reasons I decided to study at NYU was the opportunity for global experiences.").

> And I know, as well, that these developments are not just a matter of disrupted educational plans or lost opportunities or even damage to the academic enterprise; beyond all that, this order harms one of the most admired and cherished of American principles—religious non-discrimination itself.[13]

II. The Executive Order Significantly Harms NYU and Its Constituents.

By indiscriminately targeting individuals from the Muslim-majority countries of Iran, Libya, Somalia, Sudan, Syria, and Yemen without any basis to believe that such individuals pose the slightest threat to the national security of the United States, the Executive Order improperly compromises the diversity that is central to NYU's identity and mission. Approximately 120 NYU students and ten scholars at the New York City campus alone come from the six Muslim-majority countries specified in the Executive Order. Many others from those countries would be discouraged or prevented by the Executive Order from joining them at NYU.

Courts have long emphasized the importance of promoting diversity and freedom in educational environments, recognizing that, due to the classroom's vital role as a "marketplace of ideas," constitutional protections are "nowhere more vital than in the community

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13. Letter from Dr. Andrew Hamilton to NYU Community (Jan. 29, 2017), *available at* http://www.nyu.edu/about/leadership-university-administration/office-of-the-president/communications/the-recent-executive-order-on-immigration.html.

of American schools." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). "The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Id.* (internal citation and quotation marks omitted).

Diversity similarly "helps break down racial stereotypes, and enables [students] to better understand" those with different backgrounds. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). As a result, diversity helps impart the "skills needed in today's increasingly global marketplace" by "expos[ing] [students] to widely diverse people, cultures, ideas, and viewpoints." *Id.*; *see also Keyishian*, 385 U.S. at 603. Recognizing these benefits, the Supreme Court has held that the Constitution protects a school's "right to select those students who will contribute the most to the 'robust exchange of ideas . . . .'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978); *see also Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417 (2013) (recognizing compelling governmental interest in "the educational benefits that flow from a diverse student body"); *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017) (recognizing a school's ability to assert harm on behalf of its students, including harm to the university's ability to accomplish its global mission).

By its very nature and goals, implementation of the Executive Order would threaten that constitutionally protected diversity. *See Fisher*, 133 S. Ct. at 2417; *Grutter*, 539 U.S. at 328 (observing that a school's "educational judgment that such diversity is essential to its educational mission is one to which we defer"); *Bakke*, 438 U.S. 265 at

313; *see also Bery v. City of N.Y.*, 97 F.3d 689, 694 (2d Cir. 1996) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (quoting 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2948, at 440 (1973)).

The harm that will flow from the Executive Order is in any case manifest. By targeting the populations of six Muslim-majority nations for exclusion from the United States, the Executive Order will hinder NYU's efforts to expose international students and scholars to a broad array of ideas and influences. This cross-cultural exchange buttresses key democratic traditions, such as free speech, a free press,[14] free and fair elections, and freedom of assembly.[15] By fostering a culture of

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14. Indeed, many NYU graduates of the Near Eastern Studies program have gone on to be respected journalists, helping shape the thoughts for millions of readers about life and culture in the affected regions. Jared Malsin, who graduated from NYU's Near Eastern Studies in 2010, is *TIME* magazine's Middle East bureau chief, and former West Bank and Gaza Palestinian news agency Ma'an chief English editor. *See About – Jared Malsin*, *available at* http://jaredmalsin.com/about.html. Habib Battah, who graduated from NYU's Near Eastern Studies and Global Journalism program in 2010, is a prominent journalist in *Al Jazeera* covering terrorism in the Middle East among other events. *See* Habib Battah Profile, Al Jazeera, *available at* http://www.aljazeera.com/profile/habib-battah.html.

15. *See, e.g.*, United Nations Security Council Resolution 2178, adopted in September 2014, http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf (highlighting the need for "quality education for peace that equips youth with the ability to engage constructively in civic structures and inclusive political processes").

international exchange and dialogue, rather than fear and hatred, NYU's international programs thus combat radicalization.[16] Reducing this cross-cultural exchange will deprive NYU of opportunities to share those key democratic traditions with students from abroad.[17] And in doing so, the Executive Order will diminish the global reach of American universities and risk robbing the nation, and the world, of their potential contributions.

Beyond its impact on the NYU community's ability to disseminate important shared values, the Executive Order threatens NYU's own diverse international community, harming the University's current and prospective students, scholars, and faculty. In addition to the day-to-day cultural exchange that occurs at a diverse university,

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16. *See, e.g.*, *Preventing Violent Extremism Through Promoting Inclusive Development, Tolerance and Respect for Diversity*, United Nations Development Programme 11 (2016) (identifying as one strategy to prevent violent extremism "[p]romoting respect for human rights, diversity and a culture of global citizenship in schools and universities"); *see also* Marta Mikilikowska, "Development of anti-immigrant attitudes in adolescence: The role of parents, peers, intergroup friendships, and empathy," British Journal of Psychology (2017), *available at* http://onlinelibrary.wiley.com/doi/10.1111/bjop.12236/abstract (showing that adolescents with immigrant friends are "less affected by parents and peers' prejudice than youth without immigrant friends").

17. *See, e.g.*, *Study Away in the US and Around the World*, Studying Abroad | NYU, *available at* https://www.nyu.edu/academics/studying-abroad.html (video testimonials of NYU students studying abroad) ("Regardless of where you go, you're going to experience, you know, a beautiful city and a beautiful place, you are going to meet new people, you are going to have new experiences and opportunities, you are going to grow personally, you are going to grow academically, and you're going to come back a better person.").

NYU has many programs that facilitate the understanding of other cultures, such as the Hagop Kevorkian Center ("the Center"), which focuses on Near Eastern studies and was created "to foster the interdisciplinary study of the modern and contemporary Middle East and to enhance public understanding of the region."[18] To achieve this goal, it hosts events exploring topics such as "current events and policy issues relating to the Middle East,"[19] some of which include discussions relating specifically to the six countries affected by the Executive Order.[20] The Center also collaborates with "nearly 100 teachers from public and private schools across the New York metropolitan

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18. *About*, Hagop Kevorkian Center for Near Eastern Studies, NYU, *available at* http://neareaststudies.as.nyu.edu/page/about.

19. *Id.*

20. *See* http://neareaststudies.as.nyu.edu/page/upcomingevents/. For example, a discussion about misrepresentation of Muslims in western and European media is planned for September 18. *See Media, Misrepresentation, and the Middle East: A Conversation with the Editors of Mufta.org*, New York University, *available at* http://as.nyu.edu/neareaststudies/events/fall-2017/muftah.html. A documentary about Iran's first woman filmmaker will be shown on September 28. *See* Shahrzaad's Tale/Film Screening and Discussion with Shahin Parhami and Golbarg Rekabtalaei, *available at* http://as.nyu.edu/neareaststudies/events/fall-2017/IranianStudiesInitiative1.html. Hossein Bashiriyeh, key driver of democratic reform in Iran, will host a talk on October 12. *See In Conversation with Hossein Bashiriyeh*, New York University, *available at* http://as.nyu.edu/neareaststudies/events/fall-2017/IranianStudiesInitiative11.html. A discussion of *We Crossed a Bridge and it Trembled: Voices from Syria*, a book of testimonials of native Syrians' experience of the Arab Spring, will take place on October 24. *See We Crossed a Bridge and it Trembled: Voices from Syria*, New York University, *available at* http://as.nyu.edu/neareaststudies/events/fall-2017/voicesfromsyria.html.

area to participate in Center-sponsored workshops on the Middle East," which allow Center-affiliated faculty to "share expertise on the Middle East with journalists and government agencies on a regular basis and discuss current events and policy issues at university and community events."[21] These programs are vital to public awareness, which is crucial to NYU's ability to serve as an educational institution "fitting for all and graciously open to all."[22]

From the joint master's degrees offered by the Center, to the graduate programs offered by the Middle Eastern and Islamic Studies program, the value of NYU's educational opportunities is substantially predicated on the quality and diversity of its faculty and students. The Executive Order would interfere with numerous on-campus programs like these, which are central to creating an environment of intellectual and cultural exchange, and thus heightened international awareness and understanding, at a time when such understanding is more important than ever.[23]

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21. *Id.*

22. *See* NYU Mission Statement, *available at* www.nyu.edu/about.

23. *See, e.g.*, Nassir Abdulaziz Al Nasser (High Representative for United Nations Alliance of Civilizations), *UNOAC | Remarks | Parliamentary Assembly of the Mediterranean* (February 23, 2017), *available at* https://www.unaoc.org/2017/02/remarks-11th-plenary-session-parliamentary-assembly-of-the-mediterranean/ (commenting on the rise "of violence and xenophobia against minorities" and remarking that "inclusiveness has become a pre-requisite for peaceful society" when it comes to "migration laws," and that "[p]romoting and strengthening dialogue is an essential tool to prevent and defeat violent and extremist ideologies").

Finally, all students suffer when the diversity of ideas and backgrounds to which they are exposed is diminished. *See Fisher*, 133 S. Ct. at 2417. Unchecked, the Executive Order will have a direct and immediate impact on the large number of international students and scholars who wish to become affiliated with NYU or to participate in NYU academic conferences in their fields.[24] Prospective students who have yet to enroll will be delayed or entirely prevented from beginning their academic careers.

The Executive Order would deny students and scholars of vast untapped potential the success of which they are capable, harming them, the NYU community, and ultimately the world as a whole. For example, Shadi Heidarifar, a prospective graduate student who was accepted to schools worldwide but wanted to study in the United States, was not able to attend classes at NYU with worldwide leaders in her field.[25] Ms. Heidarifar has written that because of the January 27, 2017 Executive Order, her "entire future [was] destroyed in one second."[26] After saving money for the application fees "that a whole family

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24. "MEIS Statement on Executive Order to Limit Entry of Middle Eastern Refugees and Immigrants," MEIS | New York University, *available at* http://meis.as.nyu.edu/object/statement_executive_order.

25. *See* Samantha Michaels, *I'm an Iranian Woman Whose Dream Is to Study in America. Here's My Message for Trump.*, Mother Jones (Jan. 29, 2017), http://www.motherjones.com/politics/2017/01/iranian-student-trump-immigration ("We Iranian students strongly believe that diversity in ethnicity, race, religion, and color is one of the greatest strengths of the United States. And Trump's Muslim ban will destroy this.").

26. *Id.*

could live [on] for a month," Ms. Heidarifar's dreams of studying at NYU were shattered.[27] Ms. Heidarifar is now enrolled at the University of Western Ontario, in Canada.[28] As a direct result of the Executive Order, universities like NYU will be deprived of diverse, capable students who have the potential to contribute to the universities they attend and the world as a whole.

An integral part of the "business of a university [is] to provide that atmosphere most conducive to speculation, experiment, and creation." *Bakke*, 438 U.S. at 305 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in judgment)). To preserve for NYU and its students and scholars the constitutionally protected benefits of diversity and the free exchange of ideas, and to eliminate the discriminatory exclusion from the United States of persons from Muslim-majority countries, this Court should affirm the decisions of the courts below.

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27. *Id.*

28. Sana Malik, "'I'm accepted here.' Meet 4 students choosing Canada post Brexit and Trump," CBC/Radio-Canada (June 15, 2017) *available at* http://www.cbc.ca/2017/i-m-accepted-here-meet-4-students-choosing-canada-post-brexit-and-trump-1.4158965 ("The travel ban made me feel I would not get a visa for the U.S. on time. Instead, I will start my MA at the University of Western Ontario in September . . . . I hope every nation and government understands that people in the six nations and Iran are not involved in terrorism. We are not a threat to the national security of any country.").

III. The Executive Order Has the Same Unlawful Policy Outcomes as Its Predecessor, In Violation of the Constitution and the Immigration and Nationality Act.

The Executive Order recites that its aim is to "replace" Executive Order 13769, signed January 27, 2017, and respond to judicial orders granted against the earlier Order by "exclud[ing] from the suspensions categories of aliens that have prompted judicial concerns and . . . clarif[ying] or refin[ing] the approach to certain other issues or categories of affected aliens."[29] The Executive Order made various changes to the practices to be implemented under the prior Order, including removing Iraq from the list of countries whose nationals are subject to the 90-day suspension of unrestricted entry.[30] But it nonetheless suffers from many of the same defects as the prior Order, and is animated by the same unlawful, discriminatory intent.

A. The Executive Order Violates the Establishment Clause.

Because it discriminates against individuals based on their religion and reflects a clear animus towards Muslims, the Executive Order violates the Establishment Clause of the Constitution. The "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005)

29. Executive Order § 1(i).

30. *See id.* § 2(c).

(considering the "historical context" of the government act and the "specific sequence of events leading to [its] passage") (internal citation omitted).[31]

The administration would have the Court apply the highly deferential standard articulated in *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972), and *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015), that only a "facially legitimate and bona fide reason" need be offered to justify certain federal immigration policies. *Mandel*, 408 U.S. at 769. Application of that standard was rejected by the Ninth

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31. For similar reasons, the Executive Order violates the Constitution's Equal Protection Clause. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying the Fourteenth Amendment's equal protection clause to the federal government through the Fifth Amendment). Discrimination against a protected class on the basis of overt animus is the most obvious and fundamental abuse of government authority against which the Equal Protection Clause was created to protect. *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("When there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified."). As such, classifications based on religion or national origin are scrutinized to the highest degree. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (national origin); *Larson*, 456 U.S. at 244 (religion). A law may fail to withstand scrutiny even if discrimination is not "the sole purpose of the challenged action, but only that it was a 'motivating factor.'" *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (internal citation omitted). "[T]he Religion Clauses . . . and the Equal Protection Clause as applied to religion . . . all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Hassan v. City of New York*, 804 F.3d 277, 290 n.2 (3d Cir. 2015) (quoting *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in the judgment) (alterations in original, internal quotation marks omitted)).

Circuit in its decision below.[32] *See Hawaii v. Trump*, 859 F.3d 741, 769 n.9 (9th Cir. 2017).

Even assuming the *Mandel* standard did apply here, it would not foreclose judicial inquiry into improper purpose. Though deferential, *Mandel* nonetheless requires that there be a "bona fide" policy justification. As the Fourth Circuit majority opinion recognized, determining whether a justification is bona fide in turn requires consideration of the purpose of the challenged state action. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 590 (4th Cir. 2017); *see also* Bona Fide, Black's Law Dictionary 223 (4th rev. ed. 1968) ("bona fide" reason is given "sincerely," "honestly," and "with good faith."). There were no allegations in *Mandel* that the reason to exclude the communist speaker was not bona fide. Accordingly, that case dealt solely with facial legitimacy. 408 U.S. at 755, 768 n.7 (noting that all communists were subjected to the same provision). And Justice Kennedy's controlling

32. The *Mandel* standard has previously been applied only when reviewing an executive officer's decision to deny a visa. *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring). As the Ninth Circuit recognized, *Hawaii*, 859 F.3d at 769 n. 9 (9th Cir. 2017), *Mandel* is applicable only when the challenge is to claimed *misuse* of delegated authority, *Mandel*, 408 U.S. at 770 ("We hold that when the Executive exercises this power . . . *negatively*," "courts will not look behind the exercise of that discretion") (emphasis added), or when there is a constitutional challenge to a visa denial on the basis of congressionally enumerated standards, *id.* at 769-70—not when the challenge is to action *exceeding* delegated authority. *See, e.g., Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993) (addressing merits of claim that executive order exceeded authority under the INA without applying *Mandel*).

concurrence[33] in *Din* noted that "an affirmative showing of bad faith," when alleged with sufficient particularity, as here, could overcome deference to a governmental decision. 135 S. Ct. at 2141.[34] This approach also comports with more recent applications of *Mandel* and *Din*, where courts have admonished claimants for failing to allege bad faith—comments that would be non sequiturs if no such allegation could overcome deference. *See, e.g.*, *Cardenas v. United States*, 826 F.3d 1164, 1173 (9th Cir. 2016) (rejecting claim of racial discrimination because the plaintiff did "not plausibly establish that the decision . . . was made on a forbidden racial basis"); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (explaining that "a well supported allegation of bad faith . . . would render the decision not bona fide").

As described more fully below, the Executive Order clearly discriminates against Muslims. *See* Section C, *infra*. That Petitioners are able to concoct a purportedly bona fide justification for its existence does nothing to change this result. Even assuming the high bar of *Mandel*

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33. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

34. Although *Din* recognized that an affirmative showing of bad faith could nullify an executive action, the facts of that case did not address that question, as there was no allegation of bad faith, and the Court recognized that that Petitioner's admission that he "worked for the Taliban" provided "at least a facial connection to terrorist activity." 135 S. Ct. at 2141.

applies here, the evidence before the Court demonstrates that bar has been met and exceeded.

B. The Immigration and Nationality Act Limits Executive Authority to Engage in Discriminatory Conduct.

The Executive Order, like its predecessor, contravenes the letter and intent of the Immigration and Nationality Act of 1965 (the "INA"), exceeding the scope of presidential authority under that statute. The INA was enacted at the height of the civil rights movement, to dismantle the then-current system of national-origin quotas, which the nation's leaders believed to be "contrary to our basic principles as a nation."[35] The INA's legislative history shows that its intent was to "remove from our law a discriminatory system of selecting immigrants that is a standing affront to millions of our citizens."[36] Section 202 of the INA effectuates that intent by prohibiting discrimination in admissions on the basis of national origin. *See* 8 U.S.C. § 1152(a)(1)(A) (with limited statutory exceptions, "no person shall receive any preference or priority or be

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35. 111 Cong. Rec. 24,225 (1965) (statement by Senator Edward M. Kennedy). *See also id.* at 21, 778 (statement of Representative Paul Krebs that immigration rules based on national origin were "repugnant to our national traditions," and that "we must learn to judge each individual by his own worth and by the value he can bring to our Nation").

36. Immigration: Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary, House of Representatives, on H.R. 7700 and 55 Identical Bills, 88th Cong. 901-02 (1964), reprinted in 10A Oscar Trelles & James Bailey, Immigration and Nationality Acts: Legislative Histories and Related Documents, doc. 69A (1979) 410 (remarks of Attorney General Robert Kennedy).

discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."); *see, e.g.*, *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469 (D.C. Cir. 1995) (holding that Congress, in enacting Section 202, "unambiguously directed that no nationality-based discrimination shall occur").

The President's authority under INA Section 212(f) to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate," *see* 8 U.S.C. § 1182(f), is subject to at least three important limitations. *First*, any presidential proclamation under Section 212(f) requires a legitimate finding that "the entry of [the suspended] aliens or . . . class of aliens into the United States would be detrimental to the interests of the United States." *Id. Second*, Section 212(f) is circumscribed by Section 202's express and later-enacted prohibition against discrimination on the basis of national origin.[37] And *third*, Section 212(f) is a limited delegation of Congress's power to make immigration laws. *See generally* U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . ."); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (the formulation of immigration policies is

37. When there is a conflict between two provisions of a statute, the provisions should, whenever possible, be construed to give effect to both provisions. *See, e.g.*, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must "fit, if possible, all parts into an harmonious whole.").

"entrusted exclusively to Congress"). Since it is derived from Congressional authority, Section 212(f)'s delegation of authority — like Congress's power itself — is necessarily circumscribed by the Constitution.[38] *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (Congress's power to create immigration law is "subject to important constitutional limitations"); *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (the Court declined to find in the Secretary of State's facially unlimited authority to set rules governing the grant and issuance of passports an "authority" that would "trench . . . heavily" on fundamental rights, overturning the Secretary's denial of two passport applications as ultra vires); *United States v. Witkovich*, 353 U.S. 194, 199 (1957) (the facially unlimited power of the Attorney General to obtain, *inter alia*, any information from any alien subject to a final order of deportation was implicitly limited to certain relevant topics, where the broad reading proposed by the government would call into question the statute's constitutionality, and the context and legislative history of the statute did not provide unambiguous evidence that Congress intended to give the Attorney General unbridled authority). Because, as the Executive Order demonstrates, actions taken pursuant to an overbroad construction of Section 1182(f) authority can encroach on core constitutional values, presidential authority under INA Section 212(f) is necessarily subject to implicit constitutional limitations, in addition to the explicit limitations in Section 212(f) itself and in Section 202.[39]

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38. Section 202's prohibition of discrimination on the basis of national origin further limits Congress' delegation of authority to the President in INA Section 215(a)(1). *See* 8 U.S.C. § 1185(a)(1).

39. In fact, the balance of Section 212—particularly subsection (a)(1–10), which define "[c]lasses of aliens ineligible for visas or

As shown below, the Executive Order exceeds the bounds of Presidential authority under INA Section 212(f) by violating the Constitution, Section 202's unambiguous prohibition against discrimination on the basis of national origin, and INA Section 212(f)'s own requirement that an exercise of presidential authority under that section be justified by a legitimate finding that the admission of a suspended class of individuals is against the interests of the United States.

C. The Executive Order's Text and History Reveal that the Executive Order Violates the Constitution and the INA.

The Executive Order violates both the Constitution and the INA because it arbitrarily singles out six Muslim-majority countries as targets for its ban. This invidious discrimination is apparent from the text of the Executive Order itself, its history, and the unsubstantiated pretext offered to support it.

The plain text of the Executive Order's 90-day suspension of entry by nationals of the six countries discriminates against Muslims on the basis of their religion because it singles out these Muslim-majority countries without a plausible basis for doing so. The text of the order further violates the Constitution's Establishment

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admission" including on the basis of "prepar[ation] or plan[ning of] a terrorist activity," engagement in activities that would have "potentially serious adverse foreign policy consequences for the United States," or "[a]ssociation with terrorist organizations"—further suggests that Congress did *not* intend for the President to be able to use his Section 212(f) authority to discriminate on the basis of national origin, even in the purported or actual name of national security. *See* 8 U.S.C. § 1182.

Clause and Equal Protection Clause, as well as Section 202's prohibition against discrimination based on national origin. The President's denial that the Executive Order is a Muslim ban is belied by his own repeated characterization of the ban as well as by its impact: each of the targeted countries has a Muslim population of 90% or more.[40] Three of the countries—Iran, Somalia, and Yemen—have Muslim populations of more than 99%.[41]

The Executive Order's disparate impact on Muslims betrays its unconstitutionality.[42] But further, the Executive Order overtly discriminates against Muslims by exploiting and perpetuating unfounded and harmful stereotypes. The Order invokes "honor killings"[43] and "radicalized" foreign nationals.[44] These terms are not neutral, but carry very specific meanings aimed at a faith "singled out for discriminatory treatment." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 538 (1993) (holding that use of allegedly neutral terms "sacrifice" and "ritual" were

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40. Pew Research Ctr., "The Global Religious Landscape: a Report on the Size and Distribution of the World's Major Religions as of 2010," 47-50 (2012), https://goo.gl/HVoVJI (Libya is 96.6% Muslim, Syria 92.8%, and Sudan 90.7%).

41. *Id.*

42. *See Washington v. Davis*, 426 U.S. 229, 242 (1976) (disparate impact, while not determinative, "may for all practical purposes demonstrate unconstitutionality [under the Equal Protection Clause] because" in some cases the challenged action is "very difficult to explain" in terms not reflecting unconstitutional discriminatory intent).

43. Executive Order § 11(iii).

44. *Id.* § 11(ii).

evidence of singling out a particular religion in violation of the Establishment Clause).[45]

The call for public reporting of "honor killing" is a thinly-veiled attempt to paint Muslim men as domestic abusers.[46] This blatant stigmatization of Muslims runs

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45. That the language of the Executive Order is targeted against people of the Muslim faith becomes even more evident when one considers the leaked draft of the January 27, 2017 Executive Order, which included the phrase "violent religious edicts"—a transparent attempt to disparage Muslims as barbaric. Daniel M. Kowalski, *Executive Order: Protecting the Nation from Terrorist Attacks by Foreign Nationals – White House (Draft, Unsigned, Undatea)*, Lexis Nexis Legal Newsroom (Jan. 25, 2017), *available at* https://www.lexisnexis.com/legalnewsroom/immigration/b/newsheadlines/archive/2017/01/25/executive-order-protecting-the-nation-from-terrorist-attacks-by-foreign-nationals-white-house-draft-unsigned-undated.aspx?Redirected=true ("We cannot . . . admit into our country . . . those who would place violent religious edicts over American law.").

46. Executive Order § 11(iii) (calling for the Attorney General "to collect and make publicly available . . . information regarding the number and types of gender- based violence against women, including so-called 'honor killings,' in the United states by foreign nationals"); *see also* Leti Volpp, *Trump's mention of 'honor killings' betray the truth of his 'Muslim ban'*, The Hill (Feb. 22, 2017), *available at* http://origin-nyi.thehill.com/blogs/pundits-blog/immigration/320632-trumps-mention-of-honor-killings-betray-the-truth-of-his ("Honor killings stand in for the idea of Muslim barbarity. Their invocation in the executive order helps make apparent that the 'foreign nationals' whose entry poses a terrorist threat are Muslim."); Emma Green, Trump's 'Honor Killing' Tracking System Could Exacerbate Domestic Violence, The Atlantic (Mar. 7, 2017), *available at* https://www.theatlantic.com/politics/archive/2017/03/honor-killings-trump/518766/ ("The term itself is loaded: It suggests that homicide can be religiously justified. But "'honor killing' has nothing to do with Islam," argued Aisha Rahman, the executive director of Karamah, a research and advocacy organization that works on issues of gender

afoul of the Establishment Clause and Equal Protection Clause. *See Hialeah*, 508 U.S. at 538; *Romer v. Evans*, 517 U.S. 620, 634 (1996) ("[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."). It also reveals how the Executive Order does not satisfy INA Section 212(f)'s requirement of a "legitimate finding" that the admission of a suspended class of individuals is against the interests of the United States. Domestic violence is a serious problem for people of all faiths and backgrounds, not just those from the six Muslim-majority countries.[47]

In addition to being reflected in its text, the Executive Order's unconstitutional and illegal invidious discrimination is confirmed by a review of its history, including statements made by the President and others regarding its purposes. *See Hawai'i v. Trump*, No. 17-

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equity in Islam. "In Islamic law, there's nothing that's even called 'honor killing.'").

47. *See, e.g.*, *National Intimate Partner and Sexual Violence Survey 2010 Summary Report*, National Center for Injury Prevention and Control Division of Violence Prevention 40 (2010), *available at* https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf (finding domestic violence occurs against intimate partners across all races and ethnicities). Particularly when one takes into account the frequency of hyper-masculinity killings, "honor killings" are more a matter of verbiage than a culturally distinct category of crime. *See* Soraya Chemaly, Mass Killings in the US: Masculinity, Masculinity, Masculinity, The Huffington Post, Blog (Oct. 5, 2015), *available at* http://www.huffingtonpost.com/soraya-chemaly/mass-killings-in-the-us-w_b_8234322.html (noting that "[d]uring the last 30 years, all but one of the mass murders in the U.S. was committed by men, 90 percent of whom were white," and finding that mass killings disproportionately target women and are motivated partially by anti-feminist sentiment).

00050, 2017 WL 1167383, at *6 (D. Haw. Mar. 29, 2017) (Where the "'historical context' and the 'specific sequence of events leading up to' the adoption of the challenged Executive Order [is] as full of religious animus, invective, and obvious pretext as is the record here, it is no wonder that the Government urges the Court to altogether ignore that history and context.") (internal citation omitted). Although the current Executive Order was supposedly written to address the illegalities and deficiencies of its predecessor, White House Advisor Stephen Miller has admitted that the changes "are mostly minor, technical differences," and "[f]undamentally, [it will be] the same, basic policy outcome for the country."[48] Much like the original,[49] the revised Executive Order is steeped in a background of the President's discriminatory statements that, without any evidence whatsoever, perpetuated the stereotype that people of Muslim faith are largely terrorists seeking to harm the United States.[50] President

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48. Taylor Link, *Stephen Miller admits the new executive order on immigration ban is same as the old*, SALON (Feb. 22, 2017), *available at* http://www.salon.com/2017/02/22/stephen-miller-admits-the-new-executive-order-on-immigration-ban-is-same-as-the-old/.

49. *See, e.g.*, *Washington*, 847 F.3d at 1167 ("statements by the President about his intent to implement a 'Muslim ban'" and evidence that the original Executive Order represented the effectuation of that intent undermined the Government's likelihood of success on appeal of injunction of the original Executive Order).

50. *See, e.g.*, Jessica Estepa, *'Preventing Muslim immigration' statement disappears from Trump's campaign site*, USA Today (May 8, 2017), *available at* https://www.usatoday.com/story/news/politics/onpolitics/2017/05/08/preventing-muslim-immigration-statement-disappears-donald-trump-campaign-site/101436780/ (campaign website calling for a "shutdown of Muslims entering the United States" taken down May 8, 2017); Interview of Donald Trump on CBN News, YouTube (Apr. 11, 2011), https://m.youtube.com/

Trump has repeatedly called for: shutting down mosques in the United States,[51] suspicionless surveillance of Muslims in mosques,[52] a registry for all practicing Muslims,[53] racial profiling of all Muslims,[54] and a total ban of Muslims coming to the United States.[55]

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watch?v=fWzDAvemJG8 (arguing that there is a "Muslim problem" in the United States, and suggesting that the Koran teaches a "very negative vibe" and "tremendous hatred").

51. *See, e.g.*, Nick Gass, *Trump: 'Absolutely no choice' but to close mosques*, Politico (Nov. 18, 2015), http://www.politico.com/story/2015/11/trump-close-mosques-216008.

52. *See, e.g.*, Lauren Carroll, *In Context: Donald Trump's comments on a database of American Muslims*, Politifact (Nov. 24, 2015), http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/.

53. Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC News (Nov. 20, 2015), *available at* http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716. On December 21, 2016, more than a month after being elected President, Mr. Trump responded to a question about whether he was rethinking his plan for a Muslim registry by stating: "You know my plans all along, and I've been proven to be right." Video, Trump: 'You've known my plans' on proposed Muslim ban, Wash. Post (Dec. 21, 2016), *available at* https://www.washingtonpost.com/video/politics/trump-youve-known-my-plans-on-proposed-muslim-ban/2016/12/21/8a7bba66-c7ba-11e6-acda-59924caa2450_video.html.

54. Transcript, Face the Nation, CBS News (Jun. 19, 2016), http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/.

55. Ed Pilkington, *Donald Trump: Ban All Muslims Entering US*, The Guardian (Dec. 7, 2015), *available at* https://www.theguardian.com/us-news/2015/dec/07/donald-trump-ban-all-muslims-entering-us-san-bernardino-shooting. Petitioners'

The administration's attempts to cloak this discriminatory intent in neutral language are unavailing.[56] In July 2016, then-candidate Trump telegraphed his aim to disguise the language of the Muslim ban to pass legal muster, when he noted that he would henceforth refer to the Muslim countries on the basis of geographic location rather than religious majority, because "[p]eople were so upset when [he] used the word Muslim."[57] Rather

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assertion that these comments like these are a product of a candidate running for office rather than a President who took an oath to uphold the constitution is belied by the fact that these comments have continued as recently as August, 2017. *See, e.g.*, Donald J. Trump, Twitter (Aug. 18, 2017), https://twitter.com/realDonaldTrump/status/898531481185689600 ("Radical Islamic Terrorism must be stopped by whatever means necessary!"); *see also infra* pp. 20-21.

56. Petitioners' contention (Petitioners' Mem. at 48) that the judicial branch lacks any power to review the national-security conclusions or "predictive judgments" of the President, and should therefore ignore the weight of evidence that reveals the discriminatory intent that motivated the Executive Order, has no foundation in law and would be illogical here. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (the "political branches" lack "the power to switch the Constitution on or off at will"); *Zadvydas*, 533 U.S. at 695 (2001) (emphasizing that the power of the political branches over immigration "is subject to important constitutional limitations"); *INS v. Chadha*, 462 U.S. 919, 943 (1983) (rejecting the argument that Congress has "unreviewable authority over the regulation of aliens," and affirming that courts can review "whether Congress has chosen a constitutionally permissible means of implementing that power"). Judicial review of the Executive Order and the discriminatory intent that motivated it is entirely proper here, and should include all statements made by the President and his associates that shed light on its purpose and intent.

57. Donald Trump Remarks in Manchester, New Hampshire, C-SPAN (Jun. 13, 2016), https://www.c-span.org/video/?410976-1/donald-trump-delivers- remarks-national- security-threats.

than a "rollback" of previous calls for a Muslim ban, President Trump has characterized the administration's new approach as an "expansion" of his prior rhetoric.[58] A prominent advisor to the Trump campaign, Rudolph W. Giuliani recounted that President Trump wanted a "Muslim ban" and had requested that Mr. Giuliani assemble a commission to show him "the right way to do it legally."[59] Even recently, the President has affirmed, and in fact doubled down on the same rhetoric, repeatedly characterizing the Executive Order as a ban—not a temporary pause, as Petitioners assert:

- On April 26, 2017, the President stated, "the Ninth Circuit rules against the ban . . . ridiculous."[60]

- On June 3, 2017, the President stated, "We need the Travel Ban as an extra level of safety!"[61]

- On June 5, 2017, the President stated, "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is,

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58. *Id.*

59. *Trump asked for a 'Muslim Ban,' Giuliani says – and ordered a commission to do it 'legally,'* Wash. Post (Jan. 29, 2017), *available at* https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a- muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it- legally/?utm_term=.82e451dca6b8.

60. Donald J. Trump, Twitter (April 26, 2017), https://twitter.com/realDonaldTrump/status/857177434210304001.

61. Donald J. Trump, Twitter (June 3, 2017), https://twitter.com/realDonaldTrump/status/871143765473406976.

a TRAVEL BAN!"[62] The President then reiterated this point not once, but twice in the same day. He stated, "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C."[63] Less than three hours later, he stated, "we need a TRAVEL BAN . . . not some politically correct term that won't help us protect our people."[64]

- On June 13, 2017, the President stated, "the 9th Circuit did it again - Ruled against the TRAVEL BAN."[65]

- Most recently, on August 17, 2017, the President again promoted the same anti-Muslim propaganda repeated throughout the campaign that General Pershing was able to eradicate terrorism by murdering captured Muslims with bullets soaked in pigs' blood: "Study what General Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!"[66]

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62. Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871674214356484096.

63. Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128.

64. Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871899511525961728.

65. Donald J. Trump, Twitter (June 13, 2017), https://twitter.com/realDonaldTrump/status/874578159676665857.

66. Donald J. Trump, Twitter (Aug. 17, 2017), https://twitter.com/realDonaldTrump/status/898254409511129088.

Plainer evidence of animus against Muslims would be difficult to find. *See Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest.").[67]

The administration's proffered interest in securing our borders is also merely pretextual, as the Order is both under and over inclusive. A statute or rule that is under- and over-inclusive in burdening a constitutionally protected interest is not narrowly tailored to achieve

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67. Even if this was not the purpose, the indisputable perception of sect favoritism violates the Establishment Clause. *See McCreary*, 545 U.S. at 883 (O'Connor, J., concurring) (finding violation of Establishment Clause because of "unmistakable message of endorsement to the reasonable observer"); *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'") (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). And the public perception of the original Executive Order is clear: it is a Muslim ban. *See* Public Policy Polling, *After 2 Weeks, Voters Yearn For Obama* 1, 4 (Feb. 2, 2017) (finding in poll conducted on January 30-31, 2017 that "52% of voters think that the order was intended to be a Muslim ban, to only 41% who don't think that was the intent"), https://goo.gl/1L5psC. *See also CNN/ORC Int'l Poll* 9 (Feb. 3, 2017) (55% think the Executive Order "is a ban on Muslims"), https://goo.gl/0xE98B. Although public polling regarding the new ban has not been conducted, "reasonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which the [policy] arose." *McCreary*, 545 at 866 (internal citation omitted).

a compelling state interest, as required to satisfy the Establishment and Equal Protection Clauses. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 904 (1995). The Executive Order recites that its purpose is to "protect" its "citizens from terrorist attacks," and asserts that the targeted countries were identified as presenting "heightened concerns about terrorism and travel to the United States."[68] Yet by excluding hundreds of thousands of innocent refugees without a whiff of suspicion that they pose any danger, the Executive Order is wildly over-inclusive. *See Romer*, 517 U.S. at 632 (law failed rational basis review where "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects"). The Executive Order does not provide any process to determine whether potential immigrants or refugees pose a threat. It simply denies them the opportunity even to apply for admission based on their country of origin.

Furthermore, the Executive Order is dramatically under-inclusive. Despite the proffered interest in security, the Executive Order does not include on its list of affected countries any of the home countries of the perpetrators of the September 11th, 2001 attacks.[69] Nor does it include countries connected to the perpetrators of more recent

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68. Executive Order § 1(a)-(b).

69. Pamela Engel, *Trump's immigration ban doesn't include the country most of the 9/11 hijackers came from*, Business Insider (Jan. 30, 2017), http://www.businessinsider.com/trumps-muslim-ban-saudi-arabia-911-2017-1 ("[T]he [initial] executive order doesn't apply to *any* of the countries where the 9/11 attackers were from.") (emphasis in original).

domestic attacks in San Bernardino, New Jersey, New York, Orlando, or Boston.[70] Tellingly, the Executive Order does not include any of the majority-Christian nations that are listed by the State Department as "terrorist safe havens."[71] *See Larson*, 456 U.S. at 244 ("[T]his Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can pass laws which aid one religion or that prefer one religion over another.") (internal citation and quotation marks omitted). That the Executive Order so clearly picks and chooses among countries whose residents could threaten the United States reveals that the administration's proffered interest is a pretext for discrimination against people of the Muslim faith, and is therefore invalid. *See Hialeah*, 508 U.S. at 543.

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70. Eric Levenson, *How many fatal terror attacks have refugees carried out in the US? None*, CNN (Jan. 29, 2017), *available at* http://www.cnn.com/2017/01/29/us/refugee-terrorism-trnd/.

71. Chapter 5: Terrorist Safe Havens (Update to 7120 Report), U.S. Dept. of State, *available at* https://www.state.gov/j/ct/rls/crt/2015/257522.htm.

CONCLUSION

For the foregoing reasons, the Executive Order exceeds the scope of presidential authority under the INA and violates the Equal Protection and Establishment Clauses of the Constitution. This Court should therefore affirm the decisions of the courts below.

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